Filed 4/19/10 P. v. Tovar CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR RAMON TOVAR,

Defendant and Appellant.

F056714

(Super. Ct. No. VCF187340C)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Victor Ramon Tovar approached the house of a rival gang member, J.G., and started shooting through the windows of one of the bedrooms. Holding the gun close to a front window, appellant fired one shot into the bedroom while aiming at a downward angle, then moved to a side window of the same bedroom and fired two more shots in the same manner. Two final shots were fired by appellant from further back, near a carport area. J.G. and his brother, A.G., were both asleep in the bedroom at the time, and remarkably neither boy was hit by any of the bullets. Although J.G. was appellant's apparent target, appellant was convicted of *two* counts of attempted murder—i.e., an attempt to murder J.G. *and* A.G. The count regarding A.G. was based on a "kill zone" or concurrent intent theory. Appellant appeals from his conviction for attempted murder of A.G., contending that the kill zone theory was inapplicable under the facts of this case and that the instruction to the jury on that theory caused prejudicial error. We disagree and accordingly uphold the conviction. In passing, we correct two errors in the abstract of judgment, but in all other respects affirm the judgment.

SUMMARY OF FACTS

At approximately 11:35 p.m. on July 17, 2007, J.G. and his brother, A.G., were asleep in a bedroom at their residence in Visalia. The lights were off and the window closest to J.G. was open but the blinds and curtains were closed. Their parents, V.G. and T.G., were asleep in the living room of the house. J.G. was suddenly awakened by the sound of five gunshots. No one was hit with a bullet, although the boys' father, V.G., felt wood and debris falling on him and he located one of the bullets underneath a blanket he was using for a bed.

Just prior to the shooting, a female neighbor looked outside and observed the actions of two men. The two men moved quickly toward a window of the house across the street, and one of the men aimed a gun and shot it at a downward angle once into the window. The gun was about a foot from the window when the shot was fired. Then the two men ran around a corner to another window of the house where the same man shot

into that window twice from close range, again aiming downward. The neighbor's husband then took over the watching. He witnessed the two men fire an additional two shots toward the house from a carport area. He noticed that one of the men was wearing a light gray or white T-shirt. He called 911 and shortly thereafter, appellant and the other man, B.S., were arrested.

Senior identification technician James Potts confirmed that the bullets were fired from appellant's gun. The physical evidence indicated that one bullet came through the first (east) window, and three bullets came through the window frame and blinds of the second (south) window. The technician believed one of the three bullets that came through the south window was shot from the carport area. Three shell casings were found outside the windows, and another was found in the carport area approximately 130 feet away from the residence. Shoe prints were found in the dirt near the residence that were consistent with the soles of appellant's and B.S.'s shoes.

After appellant's arrest, he was interviewed by Detective Curtis Brown. In that interview, appellant confessed to doing the shooting, admitted he was a member of the Visa Boys,[1] and indicated the shooting was "[p]ayback" against a Sureno. Appellant claimed he did not know what room he shot into, or how many people were in the residence, but he assumed that "he" was there. He did not identify who "he" was, except that he was a Sureno. When appellant was asked if he wanted to kill him, appellant said, "I don't know," but added that he was "mad" because someone shot his "homie" the other day in a gang shooting.[2] He admitted he did not care whether the Surenos in the house lived or died.

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[1] Detective Brown explained that the Visa Boys was a clique or subset of the Norteno gang.

[2] Detective Brown testified that the "homie" appellant referred to was a Norteno gang member who had been recently shot in a drive-by shooting.

Further evidence was presented at trial on the issue of the gang involvement of both appellant and J.G., confirming that J.G. was a member of, or at least in close association with, the Southern or "Sureno" criminal gang while appellant was a member of the rival Northern or "Norteno" criminal gang. A number of prior incidents were indicative of such gang involvement. For example, on October 5, 2005, J.G. and appellant got into a fight at Mount Whitney High School. The fight started when appellant and two other boys came up to J.G. and one of them asked J.G. if he was a "Scrapa," which is a derogatory term used by Nortenos to insult Surenos. J.G. admitted that he hung out with Surenos, not Nortenos, but denied that he was a Sureno member. Nevertheless, he fought appellant after being called a "Scrapa."

On February 17, 2007, J.G. was standing in front of a residence with a group of Surenos when Nortenos drove by and started shooting. J.G. was shot in the leg. When police arrived, J.G. described the shooters as "Busters," a derogatory term used by Surenos to describe Nortenos. J.G. believed that he had been targeted by the Norteno gang. In May or June of 2007, a neighbor witnessed a group of 20 to 40 Norteno gang members, all wearing red, congregating outside of J.G.'s house and yelling at J.G. to come out of the house and fight them. The neighbor heard the Norteno mob use the term "[s]crap." J.G. testified that he was not home at the time. J.G.'s father, V.G., did not recall the incident.

Officer Steve Howerton was assigned to Sequoia High School in 2007, when appellant went to school there. Officer Howerton testified based on his observations that appellant was a Norteno gang member or associate at that time. Appellant hung out exclusively with the other known Nortenos, and the only times Officer Howerton saw appellant next to a Sureno was when there was a confrontation brewing that would lead to a fight. Appellant used the term "[s]crap" on more than one occasion, and admitted his allegiance to the Nortenos and his hatred toward the Surenos.

Officer Luma Fahoum testified as an expert on criminal gangs in Visalia. She explained that the Visa Boys, the group appellant identified himself with, was a clique that was part of the Norteno gang. She explained further that Nortenos and Surenos hate each other, that no insult between the two gangs goes unanswered, and that they are engaged in an ongoing war of violence and retaliation that includes murder and attempted murder, which are often accomplished through such means as shooting a rival gang member on the streets, drive-by shootings, and shooting at a rival gang member's inhabited house. Officer Fahoum was of the opinion that appellant was a Norteno gang member and that the shooting in this case was gang related. Her opinion was based, in part, on the prior incident with J.G. in which appellant approached J.G. with other gang members and used the term "[s]crap," and on the interview of appellant by Detective Brown (following appellant's arrest for the July 17, 2007 shooting) in which appellant used the term "[s]crap," confessed to doing the shooting, admitted his Visa Boys affiliation and indicated he sought "payback" against a Sureno for a shooting that had occurred the week before. She also noted that appellant admitted to being a Norteno gang member when he was previously booked at a juvenile detention facility on March 2, 2007.

Appellant took the stand in his own defense. He testified that on the night of the shooting he was high on alcohol and marijuana and that he did not really know what he was doing or why he started shooting at the house, although he was "mad" because he could not get more beer and because his girlfriend was not able to come be with him. He claimed he did not know who lived in the house or if anyone lived there. He testified that Visa Boys was not a gang or associated with a gang, but was just a group that he and his friends made up. He said that although he hung out with Nortenos, he did not consider himself a gang member. In support of appellant's defense, two relatives testified that appellant was intoxicated that night. Also, a defense expert testified that, in his opinion,

appellant did not fit the profile of a Norteno gang member or associate, and that Visa Boys was not a gang but merely a way of identifying where the group was from.

PROCEDURAL HISTORY

On September 26, 2007, the Tulare County District Attorney filed a criminal information charging appellant in counts 1 through 4 with attempted murder (Pen. Code,[3] §§ 187, subd. (a), 664, subd. (a)), and in count 5 with shooting at an inhabited dwelling (§ 246). Counts 1 and 2 alleged that appellant attempted to murder J.G. and A.G., respectively. Counts 3 and 4 alleged that appellant also attempted to murder V.G. and T.G., respectively, the parents of J.G. and A.G., who were asleep in the next room. All four counts of attempted murder alleged that appellant's conduct was willful, deliberate and premeditated within the meaning of section 664, subdivision (a). It was further alleged as to counts 1 through 5 that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b). Other special enhancements were alleged regarding the appellant's use and discharge of a firearm in connection with the criminal offenses. (§ 12022.53, subds. (b), (c), & (e).)

A jury trial was commenced on June 24, 2008. On July 3, 2008, the jury found appellant guilty on counts 1, 2 and 5, but not guilty on counts 3 and 4. As to the two guilty verdicts for attempted murder, count 1 was found to be premeditated, but count 2 was not. All other special allegations and enhancements were found to be true.

On November 6, 2008, the trial court sentenced appellant to state prison for 37 years on count 2, based on the midterm of seven years, plus 20 years for the firearm enhancement and 10 years for the gang enhancement. On count 1, appellant was sentenced to life in prison with the possibility of parole, plus 20 years for the firearm enhancement. Also, pursuant to the gang enhancement, appellant was informed he would

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3 Unless otherwise indicated, all further statutory references are to the Penal Code.

not be eligible for parole concerning count 1 until at least 15 years were served. As to count 5, appellant was sentenced to 15 years to life. The trial court ordered that the sentences on counts 1 and 5 were to be served concurrently to the sentence on count 2. Appellant's timely appeal followed.

DISCUSSION

I. Trial Court Properly Instructed Jury on Kill Zone Theory

Appellant appeals from his conviction in count 2 of attempted murder of A.G. Appellant contends that it was error for the trial court to instruct the jury on a kill zone theory in regard to the alleged attempted murder of persons in the house other than J.G. because that theory was inapplicable under the facts of this case. He further contends the instructional error permitted the jury to convict him of attempted murder of A.G. on less than proof beyond a reasonable doubt that he intended to kill A.G. We review the claims of instructional error de novo. (*People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

A. Kill Zone Theory Was Applicable

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) The doctrine of "transferred intent" applies to murder but not to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 331 (*Bland*).) Since attempted murder requires specific intent to kill a human being, a "[d]efendant's guilt of attempted murder must be judged separately as to each alleged victim." (*Ibid*., fn. omitted.)

However, even if a defendant targets one particular person, under some facts a jury could find the defendant *also*, concurrently, intended to kill other, nontargeted persons. (*People v. Stone* (2009) 46 Cal.4th 131, 137, citing *Bland, supra*, 28 Cal.4th at

p. 329.)[4] This is known as the kill zone or concurrent intent theory. The Supreme Court in *Bland*, agreeing with the analysis in the leading Maryland case of *Ford v. State* (1993) 330 Md. 682, explained the kill zone concept as follows: "The *Ford* court explained that although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' 'The intent is concurrent … when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*Bland, supra*, 28 Cal.4th at pp. 329-330.)

In *Bland*, the Supreme Court concluded under the facts of that case that "[e]ven if the jury found that [the] defendant primarily wanted to kill [the driver] rather than [the passengers], it could reasonably also have found a *concurrent* intent to kill those passengers when [the] defendant and his cohort fired a flurry of bullets at the fleeing car

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[4] *People v. Stone, supra*, 46 Cal.4th at page 138, concluded the kill zone theory was not applicable in that case because there was no particular target victim. The question on appeal in that case was posed and answered as follows: "Can a person who shoots into a group of people, intending to kill one of the group, but not knowing or caring which one, be convicted of attempted murder? Yes. The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*Id.* at p. 134.)

and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*Bland*, *supra*, 28 Cal.4th at pp. 330-331, fn. omitted.) Similarly, in *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565, where the defendants shot high-powered, wall piercing bullets into two occupied houses, the Court of Appeal concluded the jury drew a reasonable inference of specific intent to kill all those residing in the two houses. The defendants "harbored a specific intent to kill every living being within the residences they shot up.… The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Id*. at p. 564; see *Bland*, *supra*, at p. 330 [citing *People v. Vang* as a kill zone case even though that term was not used by the Court of Appeal].)

In *People v. Adams* (2008) 169 Cal.App.4th 1009 (*Adams*), where the defendant set fire to an occupied house in an effort to kill a targeted person, but three other persons were also inside the house, we affirmed the attempted murder convictions regarding the three additional residents even though the defendant was only aware that one person (her target) was present in the house at the time the fire was set. (*Id*. at pp. 1022-1023.) We emphasized in *Adams* that it is "*the means used* that distinguishes attempted murder under a concurrent intent theory from 'normal' attempted murder." (*Id*. at p. 1022, italics added.) "Where the means employed to commit the crime against a primary victim create a zone of [fatal] harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Id*. at pp. 1021-1022.) Thus, the kill zone or concurrent intent theory focuses on "'(1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm. [Citation.]'" (*Id*. at p. 1022, quoting *People v. Smith* (2005) 37 Cal.4th 733, 755-756 (dis. opn. of Werdegar, J.).)

In *Adams*, we applied the above stated analysis and concluded that the kill zone theory was applicable even if the defendant was not aware that the three other persons were also in the house (i.e., the kill zone) along with the targeted victim. We explained as follows: "The concurrent intent theory recognizes that the defendant acted with the specific intent to kill anyone in the zone of harm with the objective of killing a specific person or persons. The theory imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die. Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm." (*Adams, supra,* 169 Cal.App.4th at p. 1023.)

Here, we conclude that the trial court did not err in giving the kill zone instruction to the jury. The kill zone theory was applicable under the facts of this case because a reasonable jury could infer that in seeking to kill J.G., appellant employed means to ensure that anyone in the vicinity of J.G. would be killed as well. In appellant's interview with Detective Brown, appellant stated he assumed that "he" (i.e., a particular Sureno) would be inside, and he admitted that he did not care whether the Surenos in the house lived or died. Although it is true the case did not involve a great flurry of bullets, since only three to four bullets actually entered the house, the particular means employed of firing shots into the same bedroom from two separate windows, thereby applying deadly force into the same area from two distinct positions, together with the careful aiming of the gun downward into the bedroom from very close range, reasonably indicated that appellant intended to kill anyone who happened to be sleeping therein. Since that was the case, a kill zone was created by appellant and it was not necessary that appellant know that A.G. was present in the bedroom. (*Adams, supra*, 169 Cal.App.4th at p. 1023.) For these reasons, the trial court appropriately gave the kill zone instruction,

and the jury reasonably found that the bedroom where J.G. and A.G. slept was appellant's intended kill zone.[5]

B. The Jury Was Adequately Instructed

Using CALCRIM No. 600, the trial court first instructed the jury that in order to find appellant guilty of attempted murder, the People had to prove that appellant (1) took direct but ineffective steps toward killing another person, and (2) intended to kill that person. The same instruction went on to explain the concurrent intent or kill zone theory as follows:

> "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict [appellant] of the attempted murder of [A.G., V.G., or T.G.], the People must prove that [appellant] not only intended to kill [J.G.] but also either intended to kill [A.G., V.G., or T.G.], or intended to kill anyone within the kill zone. If you have a reasonable doubt whether [appellant] intended to kill [A.G., V.G., or T.G.] or intended to kill [J.G.] by harming everyone in the kill zone, then you must find [appellant] not guilty of the attempted murder of [A.G., V.G., and T.G.]."

Appellant argues the instruction failed to adequately explain the kill zone theory and, as a result, improperly permitted the jury to convict him on count 2 without finding that he intended to kill A.G. We disagree with appellant's claims, but more importantly, we find them to be forfeited. Appellant never objected to the use of CALCRIM No. 600, nor did he request any clarifying language to the wording of the instruction. Generally, "'"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."' [Citations.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 [challenge to CALCRIM No. 600 deemed forfeited].) Failure to

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[5] The jury found appellant not guilty of attempted murder of J.G.'s parents, who were asleep in the living room of the house. Apparently, the jury concluded the kill zone was limited to the bedroom where J.G. and A.G. slept.

object or to request clarifying instructions forfeits the issue on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483.) Moreover, as discussed below, even if appellant's claims had been preserved for appeal, we would nonetheless reject them.

In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) "When reviewing a purportedly ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury misconstrued or misapplied the challenged instruction. [Citation.]" (*Ibid*.) Here, the entire CALCRIM No. 600 instruction given by the trial court adequately informed the jury of the kill zone theory as articulated in *Bland, supra,* 28 Cal.4th 313. The instruction plainly specified the necessary elements of attempted murder, including the requirement of intent to kill the person whose attempted murder is charged. The instruction proceeded to explain that a defendant's intent to kill a specific victim does not rule out an intent to also kill, at the same time, all persons who are present in the particular zone of harm or kill zone. For purposes of the latter theory, the jury was told the People had to prove that appellant "intended to kill anyone within the kill zone." From such language, we believe the jury was informed and understood that in order to find appellant guilty of attempted murder based on a kill zone theory, it would have to be persuaded beyond a reasonable doubt that appellant intended to kill all persons who were present in the kill zone. That was sufficient. (*People v. Campos, supra*, 156 Cal.App.4th at p. 1243 [in a similar challenge, CALCRIM No. 600 upheld as consistent with *Bland*].) We conclude there was no reasonable possibility that the jury could have misconstrued or misapplied CALCRIM No. 600 so as to convict appellant of attempted murder of A.G. without finding that appellant intended to kill him (i.e., as a person present in the kill zone).

Appellant further argues that a part of the kill zone instruction was ambiguous and the ambiguity created a reasonable likelihood that the jury misconstrued or misapplied

the instruction. Specifically, while the instruction initially stated that "[i]n order to convict [appellant] of the attempted murder of [A.G., V.G., or T.G], the People must prove that [appellant] not only intended to kill [J.G.] but also either intended to kill [A.G., V.G., or T.G.], *or intended to kill anyone within the kill zone*," the final sentence stated that "[i]f you have a reasonable doubt whether [appellant] intended to kill [A.G., V.G., or T.G.] *or intended to kill J.G. by harming everyone in the kill zone*, then you must find [appellant] not guilty of the attempted murder of [A.G., V.G., and T.G.]." (Italics added.) Although, as pointed out by appellant, one sentence used the term "anyone" instead of "everyone," that language did not alter the basic meaning conveyed in the overall instruction. As noted by the Supreme Court in *People v. Stone*, "[i]n context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone." (*People v. Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3; *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1243 [same].) Therefore, the instruction was adequate notwithstanding use of the term "anyone."

Appellant next claims a misleading ambiguity existed based on the use of the word "harming" in the final sentence of the instruction, rather than the word "killing." In context, however, the jury would clearly understand that the intended *harm* being referred to was the intention *to kill* all the persons in the kill zone, since that was plainly specified in the preceding sentence of the instruction. When CALCRIM No. 600 is read as a whole, it is evident that the word "harming" was used therein as an alternative term for "killing." For example, it states that a person may intend "to kill a specific victim or victims and at the same time intend to kill anyone in a particular *zone of harm* or '*kill zone*.'" (Italics added.) In sum, although it would have been better to use the word "kill" uniformly throughout the instruction (see *People v. Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3 ["it would be better … to use the word 'kill' consistently"]), the instruction as a

whole remained adequate and the jury would not have misconstrued it to mean that something less than intent to kill was enough to convict.

Finally, appellant claims that the kill zone theory should have been more fully explained to the jury. We disagree. In *People v. Stone*, the Supreme Court noted that special instructions on this theory are unnecessary: "We … explained in *Bland* that this 'concurrent intent' or 'kill zone' theory 'is not a legal doctrine requiring special jury instructions …. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' [Citation.] Nevertheless, current pattern jury instructions discuss the kill zone theory. (CALJIC No. 8.66.1 (2004 rev.); CALCRIM No. 600 (2008).)" (*People v. Stone*, *supra*, 46 Cal.4th at p. 137, fns. omitted.) Appellant fails to explain why the jury would not be able to draw a reasonable and legally sound inference of concurrent intent to kill from the particular facts before it under the instruction given by the trial court. Indeed, it seems to us that the jury did exactly that when it concluded that appellant was guilty in count 2 of attempted murder of A.G. We reject the contention that further explanation was required.

II. Substantial Evidence Supported Conviction

Appellant claims the evidence was insufficient to show that he intended to kill A.G. We review appellant's claim under the substantial evidence test. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The gist of appellant's argument is that there was insufficient evidence of concurrent intent because appellant had no awareness that A.G. was in the bedroom at the time of the shooting. However, as explained in *Adams, supra*, 169 Cal.App.4th at page 1023, where the means employed by the defendant shows an intention to create a kill

zone, "[w]hether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm." Here, as more fully discussed above in connection with the question of whether the kill zone theory was applicable, the particular facts and circumstances of the shooting were clearly sufficient to support a finding of concurrent intent under a kill zone theory. We therefore reject appellant's claim of insufficient evidence of intent to kill.

III. Correction to Abstract of Judgment

The parties are in agreement that the abstract of judgment must be corrected in two respects. First, the abstract states that on count 1, a 10-year gang enhancement was imposed pursuant to section 186.22. However, the trial court's oral pronouncement of judgment provided that the gang enhancement imposed on count 1 under section 186.22 was that, in regard to appellant's life sentence, he could not be paroled until he had served a minimum of 15 calendar years. (§ 186.22, subd. (b)(5).) That being the case, an additional gang enhancement of a determinate term of 10 years was not applicable. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239.) Second, on count 5, the trial court imposed a term of 15 years to life, but contrary to what is set forth in the abstract of judgment, the trial court did not impose an additional five-year determinate gang enhancement. To the extent there is a conflict between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) We agree that both corrections are required, and we direct the clerk of the superior court to correct the abstract of judgment on counts 1 and 5 accordingly, by deleting the 10-year gang enhancement from count 1 and deleting the five-year gang enhancement from count 5.

DISPOSITION

The trial court is directed to correct the abstract of judgment by deleting the 10-year gang enhancement from count 1 and deleting the five-year gang enhancement from count 5. A certified copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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Kane, J.

WE CONCUR:

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Dawson, Acting P.J.

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Hill, J.